UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CARTOON NETWORK LP, LLLP and CABLE NEWS NETWORK LP, LLLP,

Plaintiffs/Counterclaim Defendants,

v.

CSV HOLDINGS, INC. and CABLEVISION SYSTEMS CORPORATION,

Defendants/Counterclaim Plaintiffs/ Third-Party Plaintiffs,

v.

TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP, LLLP, and THE CARTOON NETWORK LP, LLP,

Third-Party Defendants.

06 Civ. 4092 (DC)

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TURNER'S MEMORANDUM OF LAW IN OPPOSITION TO CABLEVISION'S MOTION FOR SUMMARY JUDGMENT

Katherine B. Forrest
Antony L. Ryan
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Plaintiffs/Counterclaim Defendants The Cartoon Network LP, LLLP and Cable News Network LP, LLLP and Third-Party Defendants Turner Broadcasting System, Inc., Turner Network Sales, Inc., Turner Classic Movies LP, LLLP and Turner Network Television LP, LLLP

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

COUNTER-STATEMENT OF FACTS 3

ARGUMENT 6

I. CABLEVISION IS ENGAGED IN THE UNAUTHORIZED REPRODUCTION OF PLAINTIFFS' COPYRIGHTED PROGRAMMING 7

A. Cablevision Itself Makes Unauthorized Copies 7

B. *Sony* and Other Photocopier, VCR and DVR Analogies Are Inapplicable 8

1. Cablevision's false analogy to the Betamax and other VCRs 8

2. Cablevision's false analogy to set-top DVRs 10

3. Cablevision's false analogy to photocopies and other reproductions occurring on a company's physical premises. 11

II. NEITHER *NETCOM* NOR THE DMCA IS APPLICABLE HERE 13

A. *Netcom* and Associated Case Law Cannot Be Applied Here 13

B. The DMCA Is Inapplicable 17

III. CABLEVISION HAS INFRINGED ON PLAINTIFFS' PUBLIC PERFORMANCE RIGHT 18

IV. CABLEVISION HAS INFRINGED ON PLAINTIFFS' DISTRIBUTION RIGHT 20

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

ALS Scan, Inc. v. RemarQ Cmtys., Inc., 239 F.3d 619 (4th Cir. 2001) 14, 16

Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) 12

Capitol Records, Inc. v. Naxos of Am., Inc., 372 F.3d 471 (2d Cir. 2004) 11

CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544 (4th Cir. 2004) 14, 15, 16

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) 7

Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006) 14, 16

Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs., 938 F. Supp. 1167 (N.D. Ill. 1997) 12, 14, 16

On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991) 18, 19

Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146 (C.D. Cal. 2002) 14, 16

Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997) 14, 15, 16

Playboy Enters., Inc. v. Webbworld, Inc., 991 F. Supp. 543 (N.D. Tex. 1997) 14, 15, 16

Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156 (1997) 12

Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) .... *passim*

Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923 (N.D. Cal. 1996) 14, 16

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) 2, 8, 9

Statutes

17 U.S.C. § 101 .... 7, 19

17 U.S.C. § 106 .... 19, 20

17 U.S.C. § 512 17

Other Authorities

Fed. R. Civ. P. 8 11

H.R. Rep. No. 105-551(II) (1998) 17

S. Rep. No. 105-190 (1998) 17

Kevin J. Delaney & Ethan Smith, *YouTube Model Is Compromise Over Copyrights*, Wall St. J., Sept. 19, 2006 15

Plaintiffs/Counterclaim Defendants The Cartoon Network LP, LLLP ("The Cartoon Network") and Cable News Network LP, LLLP ("CNN"), and Third-Party Defendants Turner Broadcasting System, Inc. ("TBS"), Turner Network Sales, Inc. ("TNS"), Turner Classic Movies LP, LLLP ("TCM") and Turner Network Television LP, LLLP ("TNT") (collectively "Turner"), submit this memorandum in opposition to Cablevision Systems Corp. and CSC Holdings, Inc.'s (collectively "Cablevision") motion for summary judgment.[1]

PRELIMINARY STATEMENT

Cablevision's summary judgment motion attempts to obscure two essential aspects of the RS-DVR Service that are dispositive of this case. The first is that the RS-DVR Service is, in fact, a "service" and not, as Cablevision claims, a mere "machine". The second is that Cablevision's role in the RS-DVR Service is active and ongoing, unlike the "passive" role that at least some Internet Service Providers and search engines have been determined to play in other contexts.

The undisputed facts on these points hardly could be more clear. Cablevision amasses the content that will be available for copying in the RS-DVR Service, chooses which content to make available for copying, reconfigures the digital format of that content for copying, makes preliminary copies independent of any individual subscriber request, stores copied content on its servers, hosts and maintains the thousands of pieces of necessary equipment for the Service in multiple facilities that it owns and operates, uses its employees as system administrators, transmits the content over its cable lines, and then charges its subscribers a monthly fee for these services. Cablevision does so without obtaining *any* licenses for its copying and transmission. Cablevision

[1] References to Cablevision's Memorandum of Law in Support of Its Motion for Summary Judgment ("Cablevision Memorandum") and Turner's Memorandum of Law in Support of Its Motion for Summary Judgment ("Turner Memorandum") are respectively designated as "CV Mem. at __" and "Turner Mem. at __".

refuses to take such licenses from copyright-holders, even though Cablevision's transmissions in the RS-DVR Service are essentially identical to its transmissions for Video on Demand ("VOD"), a fully licensed Cablevision service. Common sense and the undisputed facts tell us that the RS-DVR Service is a commercial copying and transmission service in which Cablevision would be continuously and actively engaged — one that must be licensed, just as VOD offerings are.

Terminology is crucial to Cablevision's arguments on this motion. According to Cablevision, if the RS-DVR is a "machine", by analogy, it must be just like a photocopier, DVR or VCR, and supposedly falls within the fact pattern of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) — and it is the subscribers, not Cablevision, making the copies. (*See* CV Mem. at 3, 14-17.) According to Cablevision, if its actions in connection with the RS-DVR Service are simply "passive", then case law developed (and only ever applied) in the context of the Internet might protect what would otherwise be direct infringement. (*See* CV Mem. at 18-26.) Of course, *Sony* is irrelevant here as Cablevision expressly disclaimed the "fair use" defense at the outset of this litigation. (Turner Mem. at 11.) But regardless, the Betamax machine at issue in *Sony* was merely a machine, whereas the RS-DVR Service is just that — a *service*. As the operator of that service, Cablevision, unlike Sony, is actively involved in the unauthorized reproductions and transmissions, by first providing copyrighted content (which it has licensed from rights-holders for limited specified uses that do not include the RS-DVR Service), then reconfiguring, copying and storing that content on equipment at Cablevision's facilities, and finally transmitting that content to subscribers over Cablevision's system. (*See infra* pp. 7-10.)

Finally, Cablevision's arguments premised on *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), also fail. *Netcom* and the few cases that have followed *Netcom* are all limited to the very different context of the Internet. (*See infra* p. 14.) None of these cases immunizes a direct infringer from liability when — like Cablevision — it is the sole source of the content, and has designed and implemented the business rules for copying in a closed environment that it controls. (*See infra* pp. 15-16.) Indeed, in enacting the Digital Millennium Copyright Act (the "DMCA"), which directly addressed potential infringements in connection with certain passive actors on the Internet, Congress refused to extend the blanket protection for infringement that Cablevision here seeks. The DMCA clearly does not apply when the defendant is the provider of the content and knows that the reproductions are unauthorized. (*See infra* pp. 17-18.)

COUNTER-STATEMENT OF FACTS

In a submission made simultaneously herewith, Turner responds paragraph by paragraph to Cablevision's Local Rule 56.1 Statement.[2] Turner also incorporates by reference its Statement of Facts Pursuant to Rule 56.1(a), submitted on August 25, 2006 ("SoF"). Below, we set forth a summary of the undisputed facts on the two issues relevant to this Court's decision: (1) that Cablevision is engaged in activities that require the conclusion that Cablevision is itself making unauthorized reproductions and transmissions of Plaintiffs' copyrighted programming, and (2) that Cablevision's involvement in the infringements is both active and continuous. These issues can be resolved in Plaintiffs' favor with reference to undisputed facts within the record. The legal conclusion to be drawn from these facts — that Cablevision's RS-DVR Service would infringe on Plaintiffs' copyrights —follows inexorably from these facts.

In its internal documents, Cablevision repeatedly refers to the RS-DVR as a "service". (C-SoF ¶ 1.) This characterization is unsurprising given Cablevision's ongoing role in gathering, reconfiguring, storing and transmitting content for the RS-DVR Service. Cablevision-employed system administrators will manage the Service. (C-SoF ¶ 2.) Cablevision facilities will host the massive amounts of equipment (running numerous software programs) on which the copies of copyrighted programming will be made and stored and from which they will be transmitted. (SoF ¶84; C-SoF ¶¶ 3-5.) Cablevision will make the RS-DVR Service available to its cable subscribers only for an additional monthly fee. (SoF ¶ 69.) Nothing in the record suggests that Cablevision would or could sell its RS-DVR to retailers as an independent, stand-alone "box" (as, for example, VCRs are sold) or would ever be able to install an RS-DVR system entirely within a subscriber's home.

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[2] References to Turner's response are designated as "Counter-Statement of Facts" or "C-SoF". Cablevision's Motion for Summary Judgment also relies on the Declaration of Stephanie Mitchko ("Mitchko Declaration") dated August 25, 2006, and on materials attached to the Declaration of Robert D. Carroll dated August 25, 2006. A number of these purported facts are not set forth in Cablevision's 56.1 Statement as local rules require.

Cablevision's current implementation of the RS-DVR Service is the result of numerous business decisions made (and over time changed) by Cablevision. Cablevision decides which channels will be included in the Service and has the technological ability to include or exclude programming from the Service. (SoF ¶¶ 74-76; C-SoF ¶ 7.) In its short life, the RS-DVR Service has variously included either 50 channels or 170 channels, and in some planned iterations, has excluded pay-per-view, music channels and high definition channels. (SoF ¶¶ 74-76; C-SoF ¶¶ 6-7.) Cablevision also decides how much storage capacity will be allocated to each subscriber. It has settled variously on 80 gigabytes and 160 gigabytes, and some Cablevision documents refer to allowing subscribers to make impulse purchases of additional storage. (SoF ¶ 106; C-SoF ¶¶ 8-9.) Cablevision decides the number of programs that may be recorded at a given time and whether recorded programs may be shared within a household (*i.e.*, a home with cable service on multiple television sets) or will be limited to a particular set-top box. (SoF ¶¶ 133-138.) Cablevision has referred to the RS-DVR Service as being rolled out in different "phases", with different functionality for each phase. (SoF ¶ 139; C-SoF ¶ 10.) Cablevision thus determines the functionality of the system and has the ability, which it has already demonstrated a willingness to exercise, to alter the operations and functionality of the Service.

Cablevision claims that "[t]he RS-DVR Service only operates in response to customer input" (CV Mem. at 9), but that claim is factually incorrect. As part of the Service, Cablevision reconfigures the digital format of all the programming that it chooses to make available in the RS-DVR Service, regardless of whether any subscriber has requested that programming. (SoF ¶¶ 88-91.) In addition, as part of the RS-DVR Service, Cablevision makes copies in computer memory ("RAM") that are not associated with any individual subscriber request. The first such copy is made when Cablevision sends all the programming it receives from content providers into a "clamper". (Turner Mem. at 8; SoF ¶¶ 88-91.) The second such copy is made as part of the ingestion process in Cablevision's Arroyo servers for each programming stream that has been requested by one or more subscribers. (Turner Mem. at 9; SoF ¶¶ 93-102.) Cablevision's agreements with Plaintiffs do not authorize Cablevision's reformatting of the linear signal, or the RAM copies made by Cablevision for the RS-DVR Service. (Turner Mem. at 4-5; SoF ¶¶ 26-43.)

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Only after this series of steps has occurred, and after Cablevision has made independent RAM copies of Plaintiffs' copyrighted programming, does an individual subscriber request for a particular program become relevant. If a request has been made, Cablevision creates a permanent storage copy at Cablevision's facilities. (Turner Mem. at 9; SoF ¶ 103.) This copy is maintained on a hard drive in a Cablevision server — and bits of data for programming requested by one customer may be interspersed with data for programming requested by another. (Turner Mem. at 9; SoF ¶¶ 104, 107-108.) Later transmission of the recorded programming requires obtaining the programming from this Cablevision server and, using other Cablevision equipment (located within Cablevision facilities), sending it over Cablevision's cable lines to all subscribers within a Cablevision "node" (though only the requesting subscriber will be allowed *by Cablevision* to actually view that transmission). (*See* Turner Mem. at 9; SoF ¶¶ 111-118.)

The steps that Cablevision takes to transmit programming in the RS-DVR Service are essentially indistinguishable from those that it takes to transmit programming in its licensed

VOD service. (*See* Turner Mem. at 5-6, 9-10; SoF ¶¶ 111-125.) It is no wonder that Cablevision's chief operating officer has described the RS-DVR Service as based on a "VOD Platform". (SoF ¶ 119.) Cablevision does not dispute that *it* transmits VOD content to its subscribers and that its VOD transmissions must be licensed by rights-holders. (SoF ¶¶ 38-39.) In fact, Cablevision has entered into licensing agreements for its VOD transmissions. (SoF ¶ 38.) Yet despite the essential identity between RS-DVR Service transmissions and VOD transmissions, Cablevision refuses to license content for the RS-DVR Service. (SoF ¶ 147.) Cablevision cannot reconcile those positions. The transmissions that Cablevision recognizes as its own in VOD are not somehow transformed into the subscriber's transmissions when they take place in the RS-DVR Service.

ARGUMENT

Cablevision does not contest that Turner entities own or are the exclusive licensees of copyrighted programming,[3] and does not contest that the RS-DVR Service will result in the reproduction and later transmission of that copyrighted programming. The essential elements of a *prima facie* case for infringement are therefore largely conceded. Cablevision's defense depends on the faulty legal conclusion drawn from a skewed presentation of the facts, that *it* is not the one making these reproductions or transmissions. Cablevision seeks to cloak itself in *Sony* and what it wrongly presents as analogous situations (*e.g.*, copying by photocopiers, DVRs and VCRs). (*See infra* pp. 8-13.) These assertions are factually and legally flawed. They are also undermined by Cablevision's own attempted reliance on *Netcom* and other cases involving, in the context of the Internet, entities that had a passive and incidental connection to content provided by users or third parties. (*See infra* pp. 14-17.)

[3] *See* page 3 and footnote 2 of the Turner Memorandum for a discussion of the respective roles of Plaintiffs and the various Turner entities brought in as Third-Party Defendants.

I. CABLEVISION IS ENGAGED IN THE UNAUTHORIZED REPRODUCTION OF PLAINTIFFS' COPYRIGHTED PROGRAMMING

As the facts set forth above make clear, there can be no real doubt that in connection with its RS-DVR Service, *Cablevision* reproduces Plaintiffs' copyrighted programming. (*See supra* pp. 3-6.) *All* of the programming originates with Cablevision, and Cablevision repackages that programming into a specially reconfigured programming signal and uses Cablevision equipment, software, personnel and facilities to create copies of that programming and transmit it to Cablevision subscribers. (SoF ¶¶ 85-118; C-SoF ¶ 2.)[4] Cablevision takes similar actions with respect to transmitting programming for VOD, for which it separately licenses content. (SoF ¶¶ 38-39, 51-60.) Cablevision has never disputed that it is the entity transmitting the programming in the VOD context.

Cablevision either avoids acknowledging the dispositive facts, or counters them with conclusory assertions — unsupported by the evidence of record — that the RS-DVR Service "only operates in response to customer input" (CV Mem. at 8), that the recording process "is entirely automated" (*id.* at 9), or that "it is the customer who decides what programs to play back" (*id.* at 10). These statements form the core of Cablevision's defense. Although it is true that Cablevision's RS-DVR Service makes permanent storage copies only after a subscriber has made a specific request, that is of no more significance than a customer's request that a tailor make a custom-made shirt (a shirt that would not be made but for that request). The tailor is still the one who makes the shirt. No one would seriously argue that the customer's request transformed the customer into the shirt-maker.

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[4] At least two groups of reproductions are at issue in this lawsuit: (1) buffer copies not made in response to any user request, and (2) the permanent storage copies of programming. (*See* Turner Mem. at 13-17; SoF ¶¶ 88-91, 95-103, 126-129.) Buffer copies may sometimes be made incidentally as part of a licensed transmission. But the buffer copies made by Cablevision are unlicensed. Without citing a single case or other authority, Cablevision baldly asserts that the buffer copies here "cannot constitute the basis for direct infringement". (CV Mem. at 29.) This assertion finds no support in the law. Although each buffer copy made by Cablevision may include only part of a copyrighted television program, it is well established that infringement occurs whenever "constituent elements of [a] work that are original" are copied without authorization. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). And there can be no question that Cablevision's buffer copies are sufficiently fixed to constitute infringing reproductions as they persist long enough for Cablevision to make additional reproductions from them (SoF ¶ 98). *See* 17 U.S.C. § 101 (providing that a work is "fixed" if, *inter alia*, it is sufficiently permanent or stable to be reproduced).

B. *Sony* and Other Photocopier, VCR and DVR Analogies Are Inapplicable

Cablevision's extended discussion of the protections afforded to consumer copying in *Sony* and its lengthy distinction between theories of direct and indirect copyright infringement (*see* CV Mem. at 10-17) are based on the fundamentally mistaken premise that the *Cablevision subscriber* is the only one engaged in the reproduction and transmission of Plaintiffs' copyrighted programming in connection with the RS-DVR Service. (*Id.*; *see also* CV Mem. at 1.) Cablevision is, in other words, assuming in its favor the central question presented for resolution: is Cablevision making infringing reproductions and transmissions? Cablevision disingenuously tries to elide this question due to necessity: if *Cablevision* is making infringing copies and transmissions, regardless of the subscriber's potential liability, Cablevision's liability is all but assured (save for ineffective legal arguments based on *Netcom*, *see infra* pp. 14-17). As set forth above, the undisputed facts disprove Cablevision's premise. (*See supra* pp. 3-6.) Thus, whether or not "a consumer violate[s] the copyright laws when he or she records copyrighted television programming for later personal viewing" (CV Mem. at 1) is irrelevant to the disposition of this case. Plaintiffs have asserted — and the facts prove — that Cablevision itself is engaged in direct infringement of copyrighted programming.

1. Cablevision's false analogy to the Betamax and other VCRs

Cablevision's attempted invocation of *Sony* is a red herring and should be readily disregarded. The Court's decision in *Sony* evaluates "fair use" defenses in the context of secondary infringement claims. Here, there is no secondary infringement claim (Compl. ¶¶ 37-50), and Cablevision has expressly waived any "fair use" defense (Turner Mem. at 11). Cablevision struggles unsuccessfully to find any meaningful connection between this case and *Sony* (CV Mem. at 14-15), but fails not only because the claims and defenses are different, but also because the RS-DVR Service is completely unlike the Betamax, and Cablevision's extensive involvement in the Service is unlike Sony's limited actions in connection with the Betamax.

In *Sony*, consumers purchased, for a one-time payment at the time of sale, a single stand-alone piece of equipment (the Betamax) that they would maintain and operate in their homes. No "ongoing relationship" between Sony and the consumer was required for the consumer to use the Betamax. *Sony*, 464 U.S. at 437, 438. Indeed, the *Sony* Court emphasized that "[t]he only contact between Sony and the users of the Betamax . . . occurred at the moment of sale". *Id.* at 438. In contrast, the RS-DVR Service is much more than a single box — it comprises many separate pieces of equipment, connected by Ethernet and cable lines, housed in Cablevision's facilities and operated by Cablevision personnel. (SoF ¶¶ 81-84; C-SoF ¶¶ 2-5.) An ongoing relationship between Cablevision and subscribers is essential to the RS-DVR Service, as all of the reproduction, storage and transmission functions in the RS-DVR Service occur within Cablevision's facilities, not the subscriber's home. (*Id.*) Cablevision charges subscribers a monthly fee for the RS-DVR Service and has considered ways to earn additional ongoing revenues from the Service, such as offering incremental storage purchases and inserting new advertisements into recorded programs. (SoF ¶¶ 69-71; C-SoF ¶¶ 9, 11-12.)

These are not the only critical respects in which the RS-DVR Service differs from the Betamax. In *Sony*, there was no claim that Sony was itself supplying content to the consumer, or indeed had any insight into, or control over, what content a consumer recorded. *See* 464 U.S. at 436 (noting that Sony "[does] not supply Betamax customers with respondents' [copyrighted] works"). In contrast, each time a subscriber of the RS-DVR Service wants a program recorded, Cablevision must itself supply that programming, which Cablevision has obtained only pursuant to licenses that expressly proscribe such uses. Because it is the originator of that content (SoF ¶ 85) and can view records of requested, stored, and viewed content (C-SoF ¶¶ 20-24), Cablevision has complete insight into the content being copied (and knows that it is protected by copyright). In sum, *Sony* has no bearing at all on this case.

2. Cablevision's false analogy to set-top DVRs

Cablevision's references to set-top DVRs are also unavailing. Even if the RS-DVR Service and set-top DVRs were truly analogous, that would have no legal relevance to Cablevision's liability here.

Cablevision claims that RS-DVR Service will have, from the user's perspective, the same functionality as set-top DVRs, and that the only difference between them is "one of architecture". (CV Mem. at 2, 3.)[5] The relevant inquiry, however, is into what Cablevision *does*, not what the subscriber *perceives*. On this crucial question, there are a host of critical factual differences between the RS-DVR Service and set-top DVRs. In the RS-DVR Service, Cablevision specially reconfigures the signals for all linear programming, regardless of which programs are copied — a step that does not occur with set-top DVRs. (SoF ¶¶ 88-91.) In the RS-DVR Service, where programs associated with one subscriber will be physically interspersed on the hard drives of Cablevision servers with programs associated with other subscribers, Cablevision must maintain a complex of computer hardware and software to keep track of which subscriber Cablevision will permit to view each recorded program stored on the shared hard drives at Cablevision's head-end. (SoF ¶¶ 77-78, 81-84.) None of that happens with a set-top DVR, where the recorded programs that the user can view are limited to those stored in the set-top box in his or her home. (SoF ¶ 65.) With the RS-DVR Service, playback requires transmissions from Cablevision equipment in the Cablevision head-end over Cablevision cable lines, to the Cablevision node and then into a

[5] As a matter of fact, Cablevision is incorrect: there are differences in the user experience, as the RS-DVR Service does not perform a number of functions of a set-top DVR. (C-SoF ¶¶ 25-34.)

subscriber's home (SoF ¶¶ 111-116), and Cablevision's bandwidth constraints may cause the transmission to fail (SoF ¶ 118). With a set-top DVR, recorded programming is played back directly from the set-top box within the consumer's home to the television within the consumer's home, with no transmission over any external cable lines. (SoF ¶¶ 64-65; C-SoF ¶ 13.) The RS-DVR Service, unlike a set-top DVR, requires ongoing monitoring by Cablevision personnel. (C-SoF ¶ 2.) Finally, once content has been stored on a set-top DVR, there is no evidence that the cable operator can access that content to delete it. In the RS-DVR Service, because content is stored on Cablevision's servers, Cablevision has the ability to access that content and delete it. (C-SoF ¶¶ 14-15.) As a matter of fact, therefore, set-top DVRs are unlike the RS-DVR Service, and are thus irrelevant to the determination of this case.

Even apart from these dispositive differences between set-top DVRs and the RS-DVR Service, there is no merit to Cablevision's argument that failure to sue cable operators for offering set-top DVRs constitutes an implicit concession of legality. (*See* CV Mem. at 16.) Cablevision has not asserted defenses such as waiver, estoppel or laches (or, indeed, *any* affirmative defenses) and has thereby waived them. Fed. R. Civ. P. 8(c). But, even if set-top DVRs were analogous to the RS-DVR Service, and even if Cablevision had not waived all affirmative defenses, potential actions against cable operators providing set-top DVRs would be irrelevant, as "failure to pursue third-party infringers has regularly been rejected as a defense to copyright infringement or as an indication of abandonment". *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 484 (2d Cir. 2004).

3. Cablevision's false analogy to photocopies and other reproductions occurring on a company's physical premises.

Without citation to a single case (because there is none), Cablevision asserts that a consumer's use of photocopy machines located on a company's premises and subject to its oversight cannot subject the company to liability for direct infringement. (CV Mem. at 18.) This is at the very least a gross over-simplification of what determines whether the company is a direct infringer. Worse, it ignores the vast differences between Cablevision's RS-DVR Service and consumer use of photocopy machines.

Notably, the only two cases cited by Cablevision that involved copy shops both held that businesses, such as Kinko's, are responsible for infringing copies that they make, even if those copies are made at the request of customers. *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156 (1997). In those cases, the customers (university professors) supplied the content that the copy shops copied, but the courts still found the businesses liable. *See Basic Books*, 758 F. Supp. at 1526; *Princeton Univ. Press*, 99 F.3d at 1383-84. Here, as the controller and originator of the content at issue, Cablevision's actions are even more egregious.[6]

Rather than attempt to distinguish its actions from those held to be infringing in *Basic Books* and *Princeton University Press*, Cablevision instead claims that the RS-DVR Service is like a hypothetical posed in dicta in *Netcom*. (CV Mem. at 18.) In the hypothetical, a customer uses a machine in a copy shop, such as Kinko's, to copy content that the consumer brought with him/herself. *See Netcom*, 907 F. Supp at 1369; *see also Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 938 F. Supp. 1167, 1178 (N.D. Ill. 1997) (citing copy shop hypothetical) ". Whether this scenario presents copyright issues or has ever been challenged in court is irrelevant to this Court's decision, because it is factually inapposite. *First*, in Cablevision's Kinko's

[6] Cablevision makes a half-hearted attempt to leave room for a distinction between *Basic Books* and the RS-DVR Service by asserting that Kinko's never raised an issue "with respect to whether it was the entity performing the copying". (CV Mem. at 19.) Given the central role that Kinko's played in making the copies at issue in that case, Cablevision's point is nonsensical. Moreover, Kinko's did argue that its customers were responsible for the copies and that Kinko's was acting solely as their agent, an argument that the court soundly rejected. *Basic Books*, 758 F. Supp. at 1532, 1545-46; *see also Princeton Univ. Press*, 99 F.3d at 1386 n.2.

hypothetical, the customer, *not* the store, supplies the copyrighted content, and the store is not making "business rules" about what content *it* will provide to customers. The RS-DVR Service, in contrast, is premised on Cablevision's unique access to copyrighted programming and on Cablevision's business decisions, in which no subscriber (and no content-provider) was involved, regarding what content it will make available for reproduction and later transmission. (SoF ¶¶ 85, 133-138; C-SoF ¶¶ 6-7.) Indeed, in the RS-DVR Service, the subscriber cannot originate content — the only originator is Cablevision. (SoF ¶ 85.) *Second*, in the Kinko's hypothetical, there is no suggestion that the business or its employees have knowledge of the content that customers are copying, whether that content is copyrighted or whether reproduction of that content is authorized. In the RS-DVR Service, in contrast, Cablevision has full knowledge of the copied copyrighted content, both because of its role as the originator of that content and because of its ability to view records of requested and stored content. (SoF ¶ 85; C-SoF ¶¶ 16-24.) *Third*, nothing in the factual scenario posited by Cablevision suggests that Kinko's need alter the consumer-originated content in order for it to be copied. The RS-DVR Service requires that Cablevision reconfigure the programming signal before it can be reproduced. (SoF ¶¶ 88-91.) And *fourth*, there are no facts in the Kinko's hypothetical to suggest that the business makes a permanent copy that it maintains on its premises and later transmits to the consumer on demand.

II. NEITHER *NETCOM* NOR THE DMCA IS APPLICABLE HERE

A. *Netcom* and Associated Case Law Cannot Be Applied Here

Cablevision relies on *Netcom*, and a handful of cases following *Netcom* — none of which is from this circuit — to argue that its actions with respect to the RS-DVR Service are passive and cannot support liability for direct infringement. (*See* CV Mem. at 20-27.) Cablevision's reliance is entirely misplaced.

First, *Netcom* and the other cases cited by Cablevision all occurred in the context of the Internet, and all dealt with companies alleged to have illegally copied content provided either by users or by other third parties. *Netcom*, 907 F. Supp. at 1367-68 (user-provided); *ALS Scan, Inc. v. RemarQ Cmtys., Inc.*, 239 F.3d 619, 620-21 (4th Cir. 2001) (user-provided); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) (user-provided); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1110-15 (D. Nev. 2006) (third-party-provided); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1156-63 (C.D. Cal. 2002) (third-party-provided); *Marobie-FL*, 983 F. Supp. at 1171-73, 1178" (third-party-provided); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996) (user-provided).[7] In *Netcom* the court reasoned: "The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred. Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from noninfringing bits." *Netcom*, 907 F. Supp. at 1372-73; *see also CoStar*, 373 F.3d at 548, 551 ("As the Court in *Netcom* concluded, such a construction of the [Copyright] Act is especially important when it is applied to cyberspace. There are thousands of owners, contractors, servers and users involved in the Internet whose role involves the storage and transmission of data in the establishment and maintenance of an Internet facility."). These cases are all expressly based on the unique factual circumstances and policy considerations raised by the Internet, where content from innumerable sources flows freely. *See ALS Scan*, 239 F.3d at 621-22; *Perfect 10*, 213 F. Supp. 2d at 1167. Cablevision's reliance on their holdings in the context of the closed environment of a cable television system — which Cablevision entirely controls — is without precedent or basis.

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[7] Three of the cases cited by Cablevision actually found *Netcom* inapplicable. *See ALS Scan*, 239 F.3d at 621-22 (finding that the DCMA, not *Netcom*, was controlling); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (discussed *infra* pp. 15 n.9, 16); *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 552-53 (N.D. Tex. 1997) (discussed *infra* pp. 15 n.9, 16).

Second, the *Netcom* line of cases makes repeated references to an ISP's inability to screen out infringing content and analogizes ISPs to common carriers with no control over the content they carry. *See Netcom*, 907 F. Supp. at 1370 n.12 ("Netcom would seem no more liable than the phone company for carrying an infringing facsimile transmission or storing an infringing audio recording in its voice mail. As Netcom's counsel argued, holding such a server liable would be like holding the owner of the highway, or at least the operator of a toll booth, liable for the criminal activities that occur on its roads."); *see also CoStar*, 373 F.3d at 548, 551. Today, of course, the fundamental premise of the 1995 *Netcom* case that some passive service providers are simply unable to restrict the flow of copyrighted information is itself subject to meaningful doubt.[8] In any event, Cablevision is far from a common carrier — its closed RS-DVR Service requires for its very existence Cablevision's selection, acquisition and provision of content. (*See supra* pp. 4-5.) Cablevision attempts to liken itself to the bulletin board operator in *CoStar* (CV Mem. at 20-21), but the defendant there did no more than perform a "cursory" and "insignificant" review of content submitted by users, and was "totally indifferent to the [submitted] material's content". *CoStar*, 373 F.3d at 551, 556. Cablevision, on the other hand, is the originator (through its licenses with rights-holders) of all the copyrighted content.[9]

Third, in *Netcom* and the cases that followed, the reproductions at issue were incidental to the provision of noninfringing services — the defendants' businesses were not built on

[8] *See, e.g.*, Kevin J. Delaney & Ethan Smith, *YouTube Model Is Compromise Over Copyrights*, Wall St. J., Sept. 19, 2006, at B1 (discussing "fingerprinting" process that would allow ISPs to automatically screen for copyrighted material in user-submitted content on the Internet).

[9] As several cases following *Netcom* (cited by Cablevision) have recognized, controlling the content for infringing reproductions and distributions is inconsistent with being a passive common carrier. *See Russ Hardenburgh*, 982 F. Supp. at 512-13 (finding *Netcom* inapplicable to a bulletin board operator that "had control over which files were [displayed]"); *Webbworld*, 991 F. Supp. at 552 (holding that *Netcom* was inapplicable to a website operator that "exercised total dominion over the content of its site and the product it offered to its clientele"). Like the defendants in *Russ Hardenburgh* and *Webbworld*, Cablevision has the technological ability to include or exclude any programming it wants. (*See supra* p. 5; SoF ¶¶ 74-75.)

copyright infringement. *See Netcom*, 907 F. Supp. at 1369-70, 1372 (Internet access and on-line bulletin boards); *ALS Scan*, 239 F.3d at 620 (same); *Marobie-FL*, 983 F. Supp. at 1178 (web-hosting); *CoStar*, 373 F.3d at 546-47 (real estate listings and on-line bulletin boards); *Perfect 10*, 213 F. Supp. 2d at 1158-59 (age verification service); *Sega*, 948 F. Supp. at 926 (on-line bulletin boards); *Field*, 412 F. Supp. 2d at 1110-11 (search engine). Here, the infringing reproductions and transmissions are at the heart of the RS-DVR Service. In the only comparable cases cited by Cablevision, where infringement was central to the service at issue, courts found *Netcom*'s "passive conduct" defense inapplicable. *See Webbworld*, 991 F. Supp. at 552, 561 (distinguishing *Netcom* because defendant website operator's service "functioned primarily as a store" for infringing images and "[c]opyright infringement . . . must not be allowed to serve as the cornerstone of a profitable business"); *Russ Hardenburgh*, 982 F. Supp. at 512-13. The infringing aspect of Cablevision's RS-DVR Service is what makes it attractive to Cablevision's subscribers and, as a result, profitable for Cablevision. *See Webbworld*, 991 F. Supp. at 553, 561 (noting that defendant "developed and launched [its software] for commercial use" and profited from these infringements); *Russ Hardenburgh*, 982 F. Supp. at 513.

Fourth, in several of the *Netcom* cases cited by Cablevision, courts referred to ameliorating conduct by the ISP when it learned of infringing content. For instance, in *Netcom*, the court noted that users were required to agree not to infringe on others' copyrights and that the ISP had "suspended the accounts of subscribers who violated its terms and conditions". 907 F. Supp. at 1368. In *CoStar*, the LoopNet ISP subscriber "fills out a form and agrees to 'Terms and Conditions' that include a promise not to post copies of photographs without authorization" and "when CoStar informed LoopNet of the violations, LoopNet removed the photographs" and instituted other preventive measures. 373 F.3d at 547, 555-56. Here, Cablevision concedes that unauthorized copies will be made, but seeks total immunity without conditions. Indeed, despite Turner's express protestations, and Cablevision's technological ability to exclude Turner's programming, Cablevision is proceeding on the basis that unlicensed Turner programming will be part of the RS-DVR Service. (SoF ¶¶ 74, 146-147; C-SoF ¶¶ 33-34.)

All of these factors lead to but one conclusion: *Netcom* and other cases involving passive entities in the context of the Internet are not applicable here.

B. The DMCA Is Inapplicable.

Cablevision's position in this lawsuit essentially asks this court to make law that no other court has previously made — and which was specifically excluded from the sole legislative enactment that is any way comparable to the protection sought by Cablevision, the DMCA. 17 U.S.C. § 512(a)-(d). The DMCA was enacted in response to *Netcom* and other Internet cases to deal with issues raised by the passive roles of certain ISPs on the Internet. *See* S. Rep. No. 105-190, at 19 (1998). Consistent with this intent, the DMCA's protections are limited to "service providers", a term defined to include only certain entities involved in "online communications" and providers of "online services" or "network access" — not cable operators providing television video programming services. 17 U.S.C. § 512(k). Indeed, the legislative history of the DMCA shows that Congress expressly decided to exclude cable operators — when providing a television programming service and not acting themselves as ISPs (*e.g.*, providing high-speed Internet access).[10] The DMCA is a carefully crafted statute that seeks to balance the rights of copyright-holders (by, for instance, requiring that an ISP who becomes aware of infringing materials remove them), with the need to enable the Internet to function. *See* H.R. Rep. No. 105-551(II), at 21 (1998). Notably, even the DMCA does not prevent the imposition of injunctive relief — when all of its requirements are met (which could never occur here), it limits only monetary damages. 17 U.S.C. § 512(a)-(d).

[10] *See* H.R. Rep. No. 105-551(II), at 63-64 (1998); S. Rep. No. 105-190, at 54-55 (1998) ("[O]ver-the-air broadcasting, whether in analog or digital form, or a cable television system, or a satellite television service, would not qualify [as a 'service provider'], except to the extent it provides users with online access to a digital network such as the Internet, or it provides transmission, routing, or connections to connect material to such a network, and then only with respect to those functions.").

Cablevision never suggests that its RS-DVR Service fits within the DMCA — because it clearly does not. Any reading of the DMCA makes clear that an entity that (like Cablevision) originates the copyrighted content and knows (as Cablevision does) that reproductions and transmissions of that content are unlicensed, could never receive the DMCA's protections.

III. CABLEVISION HAS INFRINGED ON PLAINTIFFS' PUBLIC PERFORMANCE RIGHT

For the reasons set forth in Turner's opening brief (Turner Mem. at 17-19) and in the Motion Picture Studios' Memorandum of Law in Opposition to Cablevision's Motion for Summary Judgment ("Studios Opp'n Mem."), it is clear that Cablevision's RS-DVR Service also infringes on Plaintiffs' exclusive public performance right. Cablevision offers two responses, both of which are unavailing. (CV Mem. at 30-35.) Cablevision first makes the odd argument that it is Cablevision's subscribers, sitting in their homes — and not Cablevision itself, with its servers loaded with ready-to-send copyrighted content at its facilities — who are actually "transmitting" the recorded content from Cablevision's servers to subscribers' television sets. Cablevision claims that it is merely a passive conduit for the infringing transmissions of its subscribers, again trying to invoke *Netcom*. (CV Mem. at 30-33.) But for the reasons set forth above (*supra* pp. 14-18), whatever limited defense *Netcom* can be construed to provide, it certainly provides no defense when a business, outside the context of the Internet, creates, operates and profits from a service, the central purpose of which is infringing on copyrighted content, and when that business provides, reformats, copies, stores and transmits content that it knows to be protected by copyright. Cablevision's active and continuous role in transmitting copyrighted content to RS-DVR Service subscribers — like its role in copying that content — bears no resemblance to the "passive" conduct at issue in *Netcom*.[11]

[11] Cablevision's role in the infringing transmissions bears a striking resemblance, on the other hand, to the conduct found to constitute infringement in *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787, 790 (N.D. Cal. 1991). Cablevision attempts to distinguish

Cablevision's second argument is that in the RS-DVR Service, each copy of Plaintiffs' programming is available for a record request by only one set-top box and that therefore no single copy of the content is ever transmitted "to the public". As set forth in the opposition brief of the Motion Picture Studios, this "no shared copy" defense has no basis in copyright law. (Studios Opp'n Mem. at 14-20.) In support of its theory, Cablevision relies on what it claims is a quotation from the legislative history of the Copyright Act (CV Mem. at 34-35), but the quoted passage does not appear on the page cited by Cablevision, and we have been unable to locate it in the Act or its legislative history. Moreover, Cablevision's "no shared copy" theory defies common sense: Cablevision will make thousands of unauthorized reproductions of Plaintiffs' copyrighted content. It is no answer for Cablevision to respond that it will only give those copies out one at a time. Cablevision's position would turn the copyright laws on their head and provide an incentive for would-be infringers to make multiple unauthorized reproductions of copyrighted content before making unauthorized transmissions.

The copyright laws protect copyrighted works, not individual copies of those works. *See* 17 U.S.C. § 106(4). Courts applying the copyright laws look not to the number of times that a particular copy of a work is transmitted or even to the number of people that receive an unauthorized transmission, but rather to the relationship between the party making the transmission (Cablevision) and the party receiving the transmission (a Cablevision subscriber). When that relationship is a commercial one, a transmission is made "to the public", and the copyright-holder's

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On Command through a misleading gloss, noting that employees of the defendant in *On Command* "manually loaded" VCR tapes into VCRs. (CV Mem. at 32-33.) In fact, the loading of content in *On Command* took place prior to any customer request. 777 F. Supp. at 788. No "manual" action was required for operation of the system in *On Command*, yet the court held that the defendant was liable for the transmission because the defendant's system — like Cablevision's system in the RS-DVR Service — "communicate[d]" "images and sounds" by a "device or process". *Id.* at 789-90 (citing 17 U.S.C. § 101 for the definition of "transmit").

exclusive public performance right is infringed upon, regardless of how many people receive the transmission. (*See* Turner Mem. at 18-19.)

IV. CABLEVISION HAS INFRINGED ON PLAINTIFFS' DISTRIBUTION RIGHT

As set forth in Turner's opening brief (Turner Mem. at 19-20), assuming *arguendo* Cablevision's position that each RS-DVR Service subscriber, and not Cablevision itself, is copying and performing Turner's copyrighted works, then Cablevision is, at the least, infringing on Plaintiffs' exclusive distribution right. 17 U.S.C. § 106(3). Cablevision's brief offers no defense to this infringement. Cablevision cannot have it both ways: Cablevision's provision to its subscribers of copyrighted programming, if not an infringing transmission, must be an infringing distribution.

CONCLUSION

For all of the foregoing reasons, Turner respectfully requests that Cablevision's motion be denied in its entirety, its counterclaim and third-party claims be dismissed with prejudice, and judgment be entered for the Turner Plaintiffs on Counts I and II of their complaint.

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Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP

By [signature]

Katherine B. Forrest (KF-1979)
Antony L. Ryan (AR-0394)

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Turner Plaintiffs, Counterclaim Defendants and Third-Party Defendants